

Exemptions - wages  
O.R.S. 23.185  
O.R.S. 23.166

In re Edward and Kerry Osworth      697-67189-fra7  
4/27/98      FRA      Unpublished

The Debtors are self-employed real estate agents. At the petition date, Mr. Osworth had a commission receivable for which he claimed an exemption under O.R.S. 23.185. The Trustee objected to the exemption on two grounds: 1) that the garnishment statute of O.R.S. 23.185 does not create an exemption recognizable in bankruptcy, and 2) the garnishment statute does not protect self-employed persons. The court denied the Trustee's objection.

The Trustee based his argument that the garnishment statute does not create an exemption on a Tennessee case. The judge in that case observed that the Tennessee statute merely limits the amount of disposable income subject to garnishment, but does not protect the income from process once it is in the hands of the debtor or placed in the debtor's bank account. Because the funds are not shielded from creditors after they have been paid, the court held that no exemption is created. In contrast to Tennessee, Oregon chose to protect funds from creditors once they have been paid to the debtor and put in his bank account, pursuant to O.R.S. 23.166. The garnishment statute in Oregon thus creates an exemption recognizable in bankruptcy.

As for the Trustee's argument that the garnishment statute does not protect self-employed persons, the court held that the statute is clear that the focus of the protection is on compensation payable for personal services, rather than on the source of the funds. Because there is no ambiguity in the statute, it will be interpreted to protect compensation payable for personal services regardless of whether the debtor is self-employed or an employee.

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8 UNITED STATES BANKRUPTCY COURT  
9 DISTRICT OF OREGON  
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11 IN RE )  
12 EDWARD M. OSWORTH, and ) Case No. 697-67189-fra7  
13 KERRY L. OSWORTH, )  
14 \_\_\_\_\_ Debtors. ) MEMORANDUM OPINION

15 The Chapter 7 Trustee in this case filed an objection to the  
16 Debtors' claimed exemption in earned commissions under O.R.S.  
17 23.185. For the reasons that follow, the Trustee's objection  
18 will be denied.

19 BACKGROUND

20 Mr. and Mrs. Osworth are self-employed real estate agents.  
21 At the petition date Mr. Osworth had a commission owed him in the  
22 amount of \$1,925, for which he claimed an exemption under O.R.S.  
23 23.185 of \$1,443.75. The Trustee objects on two grounds: 1) that  
24 O.R.S. 23.185 is not a proper exemption statute and does not  
25 shield the asset from the Trustee, and 2) that O.R.S. 23.185 does  
26 not apply to self-employed individuals.

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O.R.S. 23.185 reads in relevant part as follows:

(a) 25 percent of the individual's disposable earnings for that week;

(c) For wages payable on or after July 1, 1992. . .

(e) The amount described in paragraph (a), (b), (c) or (d) of this subsection, minus any amount required to be withheld from the individual's disposable earnings for that week pursuant to an order [for certain types of support], whichever amount is less.

The Trustee states that the question of whether O.R.S.

23.185 is a valid exemption statute for bankruptcy purposes is one of first impression in this state. That is not entirely true. While it does appear to be true that the question of the validity of the statute for bankruptcy exemption purposes has not been previously raised, there is at least one opinion which implicitly accepted it for exemption purposes. In In re Langley, 22 B.R. 137 (Bankr. D. Or. 1982), the question was whether the \$400 wildcard exemption of O.R.S. 23.160(1)(k) could be used to exempt wages of the debtor. Judge Luckey held that it could not, because wages were specifically exemptible under O.R.S. 23.185

1 and the wildcard exemption could not be used to increase any  
2 other exemption.

3       The Trustee, however, argues that O.R.S. 23.185 does not  
4 state anywhere in the statute that wages are exempt, merely that  
5 earnings are subject to limited garnishment outside of  
6 bankruptcy. He cites to a Tennessee bankruptcy case, In re  
7 Lawrence, 205 B.R. 115 (Bankr. E.D. Tenn. 1997) which held that  
8 the Tennessee garnishment statute did not create an exemption  
9 recognizable in bankruptcy. Because both the Oregon and  
10 Tennessee garnishment statutes were modeled on the Consumer  
11 Credit Protection Act, the Trustee argues, there is no reason for  
12 a court interpreting the Oregon garnishment statute to hold  
13 differently than one interpreting the Tennessee statute.

14       11 U.S.C. § 522(b)(2)(A) allows a debtor to exempt from  
15 property of the estate "any property that is exempt under . . .  
16 State or local law that is applicable on the date of the filing  
17 of the petition . . . ." There is also a federal scheme of  
18 exemptions which Oregon, like Tennessee, has opted out of,  
19 leaving only the state exemption scheme available for bankruptcy  
20 purposes.

21       The bankruptcy court in In re Lawrence stated that the  
22 "Bankruptcy Code provision for recognizing state exemptions is  
23 evidently designed to secure the same treatment to a debtor who  
24 is forced to the point of claiming exemptions, whether he is in  
25 or out of bankruptcy. If a state permits a debtor to sequester  
26 certain assets from his creditors, then the Bankruptcy Code does

1 likewise." Lawrence, 205 B.R. at 118. The court observed that  
2 Tennessee's garnishment statute was unlike the state's other  
3 exemption statutes which provide that assets shall be "exempt  
4 from execution, seizure or attachment." In contrast, the  
5 Tennessee garnishment statute merely limits to 25% the amount of  
6 disposable earnings which may be subject to garnishment. Once in  
7 the hands of the debtor, there is nothing under Tennessee law to  
8 prevent a creditor from seizing the cash from the debtor or the  
9 debtor's bank account, even if it is directly traceable to wages.  
10 Id. Because the Tennessee garnishment statute does not place the  
11 funds beyond the reach of creditors, but merely limits the amount  
12 which may be garnished, the court concluded it does not  
13 constitute an exemption statute for purposes of 11 U.S.C. § 522  
14 and Tennessee law.

15 It is true that the Oregon garnishment statute was modeled  
16 after the federal Consumer Credit Protection Act; it was enacted  
17 by the Oregon legislature, however, which was free to add  
18 protections not otherwise in the federal act. One such provision  
19 is O.R.S. 23.166. O.R.S. 23.166 requires that certain exempt  
20 funds which are deposited into an account of a debtor continue to  
21 be exempt up to an accumulation of \$7,500. The relevant part of  
22 the statute is subsection (1) and reads in part as follows:

23 All funds exempt from execution and other process under  
24 ORS . . . 23.185 (1)(b), (c), (d) and (e) . . . shall  
25 remain exempt when deposited in an account of a  
judgment debtor as long as the exempt funds are  
identifiable.

26 Unlike the law in Tennessee, Oregon has thus provided that funds

1 subject to the garnishment statute remain exempt from process  
2 even after the funds are in the hands of the debtor and are  
3 deposited to the debtor's bank account.<sup>1</sup> Oregon's garnishment  
4 statute, unlike Tennessee's, provides for an exemption under both  
5 Oregon law and federal bankruptcy law.

6 Garnishment Statute Applies to Self-Employed

7 The Trustee argues that even if O.R.S. 23.185 provides an  
8 exemption recognizable in bankruptcy, it wouldn't apply in the  
9 present case because the statute only provides relief to  
10 employees, not self-employed persons. I disagree.

11 O.R.S. 23.175 (2) defines earnings for purposes of O.R.S.  
12 23.185 as "compensation paid or payable for personal services,  
13 whether denominated as wages, salary, commission, bonus or  
14 otherwise, and includes periodic payments pursuant to a pension  
15 or retirement program." The statute speaks in terms of  
16 compensation paid for personal services, but does not limit the  
17 source of that compensation in any way. Both Oregon and federal  
18 bankruptcy courts must interpret statutory language by first  
19 looking at the text of the statute to determine whether it is  
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21 <sup>1</sup> O.R.S. 23.166 does not directly refer to those earnings protected from  
22 garnishment under O.R.S. 23.185(1)(a). It does, however, give continuing  
23 protection to those funds which exceed the amount calculated in O.R.S.  
24 23.185(1)(e). O.R.S. 23.185(1)(e) refers to the amounts described in (a),  
25 (b), (c), or (d) of O.R.S. 23.185(1), minus any amounts required to be  
26 withheld for certain support obligations. Except in those cases where the  
support obligation may exceed the maximum amount subject to garnishment under  
the other subsections, subsection (e) protects the same amount of earnings  
from garnishment as does subsections (a) to (d). In any case, if none of the  
specified support obligations apply, the amount protected by subsection (e)  
would equal the amounts calculated under (a), (b), (c), or (d) in every case.

1 clear and unambiguous. See McIntire v. Forbes, 322 Or. 426, 429,  
2 909 P.2d 846, 848 (1996) (Court must "first examine the text and  
3 context of the provision to try to ascertain the intent of the  
4 legislature and, if the intent is clear from that inquiry, then  
5 we proceed no further"); United States v. Ron Pair Enterprises,  
6 Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation  
7 should be conclusive, except in the 'rare cases [in which] the  
8 literal application of a statute will produce a result  
9 demonstrably at odds with the intentions of its drafters'."). It  
10 is clear from O.R.S. 23.175(2) that the focus of the protections  
11 afforded a debtor under O.R.S. 23.185 is the type of income (i.e.  
12 compensation for personal services) rather than the source of  
13 that income. Accordingly, I hold that the debtor may not be  
14 denied an exemption under O.R.S. 23.185 due to the fact that he  
15 is self-employed. <sup>2</sup>

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18 <sup>2</sup> Chief Judge Higdon held in a letter opinion in In re Mathis, Case No.  
19 694-60455-psh7(Bankr. D. Or. 1/6/95) that O.R.S. 23.185 applies only to  
20 debtors in an employee-employer relationship. That opinion was based to a  
21 large extent on the findings of courts in other states which interpreted the  
22 Consumer Credit Protection Act and the state garnishment statutes modeled on  
23 the federal act. These Courts looked to what they thought to be Congress'  
24 intent. As noted above, I do not think the statute is ambiguous, and  
25 therefore find that resort to such rules of construction is not called for.  
26 Moreover, these courts err in two respects: First, by looking to congressional  
intent they overlook the fact that the statutes were enacted by the states,  
and that it is their intent that controls. Second, there is no principled  
distinction between compensation payable to an employee and to an independent  
contractor, and no basis for finding that any legislature (including  
Oregon's) intended to discriminate against non-employees in the fashion  
suggested by the trustee. In Oregon creditors are protected from abuse by  
independent contractors by a limitation on the amount exempted by O.R.S.  
23.166.

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